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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., MILLIKEN & COMPANY, ARKWRIGHT MILLS, SPARTAN MILLS, BLAIR MILLS, INC., HERMITAGE, INC., DAN RIVER, INC., CONE MILLS CORPORATION, MAYFAIR MILLS, SPRINGS MILLS, INC., RIEGEL TEXTILE CORPORATION, FIELDCREST MILLS, INC., AND WEST POINT-PEPPERELL, INC.,

Petitioners,

v.

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI AND REPLY TO BRIEF FOR THE FEDERAL RESPONDENTS

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI AND REPLY TO BRIEF FOR THE FEDERAL RESPONDENTS

The Government argues that the petition filed by the textile industry in this case should be held pending disposition of *Republic Steel Corp.* v. *OSHA, cert. granted,* No. 78-918 (July 2, 1980) and *American Iron and Steel Institute* v. *OSHA, cert. granted,* No. 78-919 (July 2, 1980) (*Coke Ovens*).[1] The Government's contention is without merit because this case presents several issues not presented in *Coke Ovens.* Moreover, particularly in light of the recent

[1] Brief for the Federal Respondents (Government's Brief), p. 5.

decision in *Industrial Union Dept. AFL-CIO* v. *American Petroleum Institute, Inc.*, No. 78-911, 48 U.S.L.W. 5022 (July 2, 1980) (*Benzene*), review in this case will complement review in *Coke Ovens* and will provide the opportunity for comprehensive determination of OSHA's regulatory authority under the Occupational Safety and Health Act of 1970 (the Act).

Coke Ovens presents two issues: (i) whether OSHA's finding of technological feasibility must be supported by substantial evidence; and (ii) whether OSHA must show that the standard it selected provides measurable health benefits that bear a reasonable relationship to the costs of the standard.[2] While this case presents the issue whether a reasonable relationship must be shown between costs and benefits, it provides a more complete context for resolution of this issue than does *Coke Ovens*.

Though *Coke Ovens* presents the issue whether OSHA must strike a balance between costs and benefits, it does not question the nature of benefits necessary to achieve a balance. On the other hand, this case does present the question whether OSHA can demonstrate a balance between costs and benefits if comparable protection against material impairment of health may be achieved with a far less expensive standard.[3]

In addition, this case presents four issues not presented in *Coke Ovens*. These four issues will require decision without regard to whether the Court holds that OSHA must

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[2] *See* Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit filed by American Iron and Steel Institute in No. 78-919.

[3] The Government incorrectly contends that the textile industry petition raises no challenge to the extent of health risk from cotton dust exposure. Government's Brief, p. 5, n. 4. To the contrary, the Petition directly raised the argument that the nature and extent of health risk from cotton dust make effective a less expensive alterna-

demonstrate a reasonable relationship between costs and benefits to establish feasibility of its standards.

1. Wholly apart from the question of a balance of costs and benefits, petitioners submit that OSHA cannot justify an unnecessarily expensive standard as "reasonably necessary or appropriate" within the meaning of Section 3(8) of the Act, 29 U.S.C. § 652(8). The plurality opinion in *Benzene* held that in order to establish a standard as "reasonably necessary or appropriate," OSHA must make a threshold finding that a significant risk of material impairment of health exists with respect to a toxic substance.[4] In *Benzene* OSHA did not meet this threshold requirement because it assumed rather than proved that there is "no safe level" for benzene exposure and that the standard should set the exposure limit at the "lowest feasible" level.[5]

Unless the Court holds that OSHA's obligation to respond only to significant risk of material impairment ends when it crosses the threshold, precisely the same analysis that invalidated the Benzene Standard also invalidates the Cotton Dust Standard. This is so because OSHA applied its automatic "lowest feasible" policy to cotton dust[6] and thereby foreclosed consideration of a far less expensive alternative that would provide protection against material impairment of health comparable to the more stringent standard OSHA chose.[7]

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tive to OSHA's automatic "lowest feasible" approach. Petition, p. 9. Moreover, the nature and extent of health risk is a vital part of the questions whether a reasonable relationship between costs and benefits should be required and whether it has been shown to exist.

[4] Slip Opinion, p. 29, 48 U.S.L.W. at 5030.

[5] OSHA derived its assumption from its policy for all carcinogens: "Given OSHA's cancer policy, it was in fact irrelevant whether there was any evidence at all of a leukemia risk. . . ." Slip Opinion, p. 14, 48 U.S.L.W. at 5026.

[6] 41 Fed. Reg. 56505 (1976).

[7] This alternative recommended by industry proposed more mod-

The alternative was based on the critical facts that distinguish regulation of cotton dust from all previous OSHA health regulation. First, cotton dust is not a carcinogen.[8] Second, the health condition, byssinosis, is detectible when it is mild and reversible, years before any disability or permanent impairment might result.[9] However, OSHA refused to depart from its cancer policy even though OSHA admitted that medical surveillance could effectively prevent the serious, irreversible stages of byssinosis,[10] and even though OSHA never found that the mild and reversible stages of byssinosis constitute material impairment.[11]

2. This case presents the issue whether, in order to establish feasibility, OSHA must meet specific criteria[12] about the accuracy of its cost estimate and the effect on industry of bearing those costs. This question cannot be resolved in *Coke Ovens* because in that case petitioners do not challenge OSHA's cost estimate or its assessment of impact on industry and the public.

In *Benzene,* the Court decided that the Act must be construed to provide criteria as to the benefit side of the

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erate and affordable exposure limits than those adopted by OSHA. The keystone of the alternative program would be medical surveillance to identify employees with early, mild and reversible symptoms. Those exhibiting early symptoms would be protected from further risk by selective respiratory use or transfer to low exposure areas, as medically appropriate for the individual. Petition, p. 9.

[8] Appendix to Petition in No. 79-1429 (App.), p. 36, n. 35.

[9] Ex. 6, No. 34, p. 321 (Joint Appendix to the Court of Appeals, hereinafter J.A., 347); Ex. 6, No. 56, p. 26 (J.A. 384).

[10] 43 Fed. Reg. 27359 (1978).

[11] While OSHA termed the early effects "significant," it did not make the crucial finding of material impairment. 43 Fed. Reg. 27354 (1978). Indeed, it could not have done so properly since the early stage of byssinosis does not impair or disable an individual at all. Martin Tr. 1779 (J.A. 3741), Statement of Jack Whitworth, Ex. 42, p. 6 (J.A. 1992).

[12] Appropriate criteria are suggested in Petition, p. 17.

regulatory equation, *i.e.*, what health risks may be regulated. The petition here raises precisely the same issue as to the other side of the equation, the cost or feasibility side of the Act.

The decision in *Benzene* provides strong support for petitioners' position that OSHA must meet specific criteria to establish its standards as feasible within the meaning of Section 6(b)(5) of the Act.[13] In *Benzene*, a majority of the Court indicated that unless the statutory terms "reasonably necessary or appropriate" and "feasible" are construed to provide meaningful guidance about the bounds of OSHA's rulemaking authority, the Act may be an open-ended grant of power constituting an unconstitutional delegation of legislative authority.[14]

In this case, OSHA argued and the court below held that an OSHA standard is economically feasible so long as it alone does not destroy the entire industry.[15] This is an open-ended grant at least as unconfined as that which the plurality in *Benzene* found to require a limiting construction. This case is an appropriate vehicle for enunciation of criteria which will give substance to the statutory limitations on that grant.

Moreover, wholly aside from the need to give substance to the statutory limitations on OSHA's authority, OSHA cannot satisfy even the most lenient test for feasibility without fulfilling some specific criteria. Thus OSHA has no basis to conclude that a standard will not cripple or destroy an industry unless OSHA has both a reliable cost estimate and reliable evidence, not assumptions, to show that industry can absorb the costs or pass them on. OSHA did

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[13] 29 U.S.C. § 655(b)(5).

[14] Slip Opinion, p. 35, 48 U.S.L.W. at 5032; *See also* concurring opinion of Rehnquist, J., 48 U.S.L.W at 5042.

[15] App. 67, 69.

not have reliable evidence on either point when it promulgated the Cotton Dust Standard.

3. This case presents the issue whether a court providing judicial review under the substantial evidence test may, as the court below did, confine its review to the adequacy of the agency's articulation of its statement of reasons, without testing the reliability of the agency's findings. The Government contends that the court below provided full review and that petitioners merely "surmised" that the court applied the truncated review known as the 'Bazelon heterodoxy'.[16] On the contrary, it is the opinion below that announces this syntactical review as the controlling approach to review.[17]

For example, the decision below allowed OSHA to assume, against all evidence, that all of the technology necessary to meet its standard could be created and installed in four years.[18] Moreover, the court allowed OSHA to use as the cost estimate for its stringent standard industry's estimate for a far less stringent standard. In doing so, the court's only supporting citation for the crucial proposition that industry's measures and an unspecified "little more" would meet OSHA's stringent standard was the *post hoc* rationalization of counsel.[19] If the court below had given the kind of full substantial evidence review given by this Court in *Benzene*, it would have found that OSHA never made the crucial finding attributed to it by counsel.

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[16] Government's Brief, p. 6.

[17] App. 45, n. 66, citing Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir. 1976) (Bazelon, C. J., McGowan, J., concurring); Internat'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C. J., concurring in result); *See* Petition, pp. 20-25.

[18] *See* Petition, pp. 12-13.

[19] App. 65, n. 136. It is well settled that "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action. . . ." SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

There can be few issues more important to the application of the Act than the level of review required of the courts of appeals. This case presents this issue squarely and provides an appropriate occasion for its resolution.

4. This case presents the issue whether OSHA may properly depart from the safety and health field to regulate the economic relationship in the workplace by imposing wage guarantees such as that in the Cotton Dust Standard. The Government advances two reasons to justify the wage guarantee provision: (i) the wage guarantee provision is a limited provision designed to aid worker health; and (ii) the provision does not conflict with congressional intent as interpreted in *Whirlpool Corp.* v. *Marshall,* 48 U.S.L.W. 4189 (Feb. 26, 1980) and as expressed in Section 4(b)(4) of the Act.[20] Neither contention withstands scrutiny.

Contrary to the Government's contention that OSHA imposed wage guarantees for health reasons, OSHA itself stated clearly that the goal of the provision was to remove adverse economic impact, not health effects.[21] Moreover, the Government's claim that the wage guarantee provision is a "limited" provision ignores the fact that OSHA apparently intends to engage in extensive regulation of the economic relationship between employer and employee. OSHA has foretold this by already promulgating an extremely broad wage guarantee provision in its lead standard.[22]

In addition, the wage guarantee provision conflicts directly with congressional intent. The overriding congressional intent expressed by Congress' rejection of the "strike with pay" provision is that employers should not be forced to pay normal wages to employees who, for safety reasons,

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[20] Government's Brief, pp. 7-10.

[21] 43 Fed. Reg. 27387 (1978). *See* Petition, pp. 25-26.

[22] 43 Fed. Reg. 53007 (1978).

are not performing their normal jobs. *See Whirlpool Corp.* v. *Marshall, supra,* 48 U.S.L.W. at 4193-94. Yet the wage guarantee provision forces employers to do precisely that. Indeed, with exactly the same rationale that the Government advances to support the cotton dust wage guarantees, OSHA could promulgate a full blown strike with pay provision. Petitioners respectfully ask the Court to confirm that it is beyond OSHA's authority to promulgate either provision.[23]

CONCLUSION

Because this case presents important issues complementary to and separate from those in *Coke Ovens,* the Petition For A Writ Of Certiorari should be granted at this time. If the Petition is granted, petitioners suggest that the Court may wish to consider scheduling the case for argument on the same day as *Coke Ovens.*

Respectfully submitted,

AMERICAN TEXTILE
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[23] The Government's claim that wage guarantee provisions do not supersede or affect state workman's compensation statutes in violation of Section 4(b)(4) of the Act, 29 U.S.C. § 653(b)(4), is simply incorrect. The wage guarantees essentially set a "federal workman's compensation" level of 100 percent of pretransfer wages.

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The undersigned, who certifies that he is a member of the bar of this Court, hereby certifies that on this 14th day of August, 1980, three copies of the foregoing Supplement To Petition For A Writ Of Certiorari And Reply To Brief For The Federal Respondents filed by the American Textile Manufacturers Institute, Inc., Milliken & Company, Arkwright Mills, Spartan Mills, Blair Mills, Inc., Hermitage, Inc., Dan River, Inc., Cone Mills Corporation, Mayfair Mills, Springs Mills, Inc., Riegel Textile Corporation, Fieldcrest Mills, Inc. and West Point-Pepperell, Inc. were mailed, postage prepaid, to each of the following persons at the addresses indicated below:

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